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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Telecommunications Act of 1996	)	
	)	CC Docket No. 96-238
Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers	)	

REPLY COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

MCI TELECOMMUNICATIONS CORPORATION

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Dated: January 31, 1997

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SUMMARY

The comments generally support the recommendations of MCI Telecommunications Corporation (MCI) that the Commission modify certain of its proposed revisions to the formal complaint Rules, in the interest of protecting the statutory and due process rights of parties. The recommendations presented by MCI would allow the Commission to meet the new deadlines for resolving formal complaints without undermining due process rights.

The comments agree that a major focus of complaints will be the Bell Operating Companies' (BOCs') anticipated efforts to thwart the entry of competitors into the local service market. Such complaints should be decided in the same 90-day period established for Section 271(d)(6) complaints.

The Commission's proposals to encourage settlements of potential complaints during the pre-filing stage are commendable. However, it should reject the suggestions of NYNEX and PacTel to compel complainants to engage in costly mediation procedures and to provide lengthy pre-filing notification of their intentions even before being allowed to file complaints. Those proposals would impose unreasonable financial obstacles and delays on complainants and would only serve to shield defendants from potential claims.

The Commission should also reject the contentions of some parties that complaints based on information and belief should be prohibited in all cases. As MCI and other parties explained, a complainant that attempts unsuccessfully to obtain documentary

support for its complaint from a defendant during the pre-filing stage should not be penalized for its inability to obtain that support, and the Commission therefore should allow complaints based on information and belief in those circumstances.

It is crucial that the Commission reject the contentions of some parties that discovery be permitted only at the discretion of the Staff. Discovery affords complainants the ability to obtain the vital information they need from defendants that would not otherwise be available. Moreover, the Staff can manage the discovery process to ensure it is conducted efficiently.

There is virtually unanimous agreement that parties be allowed to file briefs, irrespective of whether discovery is allowed. Briefs would permit parties to distill the factual exchanges presented in complaints, answers, and joint stipulations, and to succinctly frame and address the legal issues, and would significantly assist the Commission in deciding all cases, even in cases where there is no discovery.

There is also broad support for the Commission's proposal to bifurcate the liability and damages phases of complaint proceedings. However, the Commission should not adopt its proposal that a precise calculation of damages be set forth in the complaint. Instead, the complainant should describe its damage calculation methodology and use discovery to refine its calculation, since complainants often lack the information necessary to calculate damages at the outset of the proceeding.

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REPLY COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

MCI Telecommunications Corporation (MCI), by its undersigned attorneys, submits these reply comments in response to the Commission's Notice of Proposed Rulemaking (Notice)[1] concerning modifications to the Commission's Rules governing formal complaint proceedings.[2] The comments filed in this docket recognize that the Commission must revise its Rules in light of the accelerated deadlines established by the Telecommunications Act of 1996 (1996 Act) for adjudicating formal complaints, and they generally support MCI's recommendations.

I. INTRODUCTION

The Commission is facing the dual challenge of developing new procedures for resolving formal complaints while protecting the due process and statutory rights of complainants to secure

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[1] FCC 96-460 (released November 27, 1996).

[2] See 47 C.F.R. §§ 1.720-1.735.

relief for violations of the Communications Act. As MCI and most parties observed in their comments, many of the Commission's proposals would accomplish those objectives, but other proposals must be revised to ensure that the fundamental rights of complainants are not unreasonably subordinated to the demands of the new deadlines.

The comments support MCI's view that local service market entry and interconnection issues will now become the major focus of formal complaints. Those complaints will arise under Sections 251 or 252 of the Act, involving a Bell Operating Company's (BOC's) failure to comply with its interconnection responsibilities to new local exchange service providers, and under Section 271(d)(6) of the Communications Act, addressing a BOC's failure to satisfy the conditions for in-region interLATA authority.

The 1996 Act imposes a 90-day deadline for adjudicating complaints alleging that a BOC is failing to meet the conditions established for its entry into the interLATA market. As MCI explained, complaints arising under Sections 251 or 252 would present equally important public interest local competition issues. Both types of complaints would address essentially the same crucial issue -- whether the BOC is blocking or impeding the efforts of competitors to enter and compete in the local service market -- and therefore both should be decided on the same expedited 90-day schedule. Moreover, as MCI observed, the Commission should be able to resolve a formal complaint involving

local competition issues in 60 days where a relevant administrative or judicial record exists in a prior proceeding that can be incorporated, and readily supplemented, in the new complaint proceeding.[3]

Some parties disagreed with the Commission's view that complaints involving alleged violations of Section 271(d)(3) of the Act can be decided within 90 days by a Common Carrier Bureau decision rather than by a Commission order. See 47 U.S.C. § 271(d)(6).[4] The interpretation of the statute advanced by these parties is erroneous. Section 0.91 of the Commission's Rules delegates authority to the Common Carrier Bureau to carry out the duties assigned to the Commission under the Communications Act, except those duties reserved to the Commission under Section 0.291 of the Rules. Section 0.291 does not reserve to the Commission the right to decide complaints relating to a BOC's failure to satisfy the conditions imposed by any order under Section 271 of the Act. Accordingly, the Commission can delegate authority to the Common Carrier Bureau to "act on" complaints alleging a violation of Section 271(d)(3) of the Act. Nothing in Section 271(d)(6)(B) of the Act requires that such complaints always be decided by the Commission rather than by the Common Carrier Bureau.

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[3] MCI Comments at 5-6.

[4] NYNEX at 17-18; PacTel at 35-36; SWBT at 14-15.

II. PROPOSED MODIFICATIONS TO THE COMMISSION'S FORMAL COMPLAINT PROCEDURES

In the following discussion, MCI will address those comments that deal with the particular issues and concerns raised by the Commission's procedural proposals.

A. Pre-Filing Procedures

In the interest of minimizing the need for parties to file complaints and to encourage them to narrow their differences, the Commission proposed that a complainant certify that it discussed, or attempted to discuss, in good faith a settlement of its dispute with the defendant.[5] MCI supported the Commission's goal and recommended that parties be given incentives to use the pre-filing period to exchange relevant information and documents -- activities that otherwise would take place after a complaint is filed.

MCI recommended that if an incumbent local exchange carrier (ILEC) refuses to give a complainant relevant documents it requests or is dilatory in responding, the Commission should penalize the ILEC by relaxing the threshold standard that a complainant must otherwise satisfy in documenting the basis for its complaint. To avoid any dispute over whether ILECs are engaging in these stonewalling practices, MCI suggested that the Commission establish a deadline, such as two weeks, for parties to respond to document requests during the pre-filing period.

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[5] Notice at ¶ 28.

MCI also recommended that where a defendant has been recalcitrant in producing documents during the pre-filing period, parties be allowed to base complaints solely on information and belief.[6]

Most parties agree that settlement discussions and exchanges of information should be encouraged during the pre-filing period.[7] Some parties, however, argue that it is unnecessary to require pre-filing settlement efforts.[8] Given the very tight deadlines the Commission faces, there is merit in encouraging parties to settle their disputes and to use the pre-filing period to exchange information to accomplish some of the work that must be done after a complaint is filed. However, as Sprint has explained,[9] the Commission should reject any proposals of likely defendants to convert a requirement designed to encourage settlements into a vehicle for unreasonably delaying complainants from exercising their rights to file complaints.[10]

Thus, the Commission should reject NYNEX's suggestion that a complainant must seek pre-filing mediation through alternate

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[6] MCI Comments at 6-11.

[7] See, e.g., America's Carriers Telecommunications Association (ACTA) at 2-3; Bell Atlantic at 3; BellSouth at 6-8; Cincinnati Bell at 5-6; GTE Corporation (GTE) at 2-3; MFS Communications Company, Inc. (MFS) at 2-4; NYNEX Telephone Companies (NYNEX) at 2-4; Sprint Corporation (Sprint) at 4-7; and Southwestern Bell Telephone Company (SWBT) at 1-2.

[8] CompTel at 2-4; ICG at 3-8.

[9] See Sprint at 6.

[10] Bell Atlantic at 2-3; BellSouth at 6-8; NYNEX at 3-4.

dispute resolution (ADR) procedures, with the mediator providing a statement to the Commission that the complainant made a good faith settlement effort.[11] No legitimate purpose would be served by NYNEX's proposal. NYNEX's transparent goal is to raise the cost of prosecuting complaints immensely, thereby discouraging some parties from even seeking relief, and to deny all parties the ability to obtain prompt relief for violations of the Act. The resulting handicap to new entrants in their efforts to gain a foothold in the market could have a chilling effect on the development of local competition.

The Commission should also reject PacTel's suggestion that a complainant certify that it served a "Notice of Attempt to Settle Dispute" on defendants, setting forth all the issues in dispute, at least 30 days before filing its complaint or certify its reasons for not doing so.[12] Some pre-filing notice of a complainant's intention would be appropriate, but 30 days is clearly too long. Parties do not require that amount of time to settle a dispute if both are amenable to settlement. The pre-filing procedures should be a mechanism to hasten the ultimate resolution of disputes, by encouraging settlement discussions and the early exchange of information, not a device for delay.

The Commission should also reject US West's suggestion to abandon entirely this proceeding and instead establish an

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[11] NYNEX at 3.

[12] PacTel at 4-5.

advisory committee for the purpose of revising its rules.[13] The current proceeding is an appropriate vehicle for accomplishing the Commission's goals, and the broad support elicited for many aspects of the Notice demonstrates that the Commission is moving in the right direction.

B. Format and Content Requirements

MCI supported the Commission's efforts to require complainants to provide better documentary support for their positions, but cautioned that a more stringent pleading requirement not become a shield for the BOCs against valid claims of discrimination and other unlawful conduct. As MCI observed, in many situations, such as discrimination claims, documentary support for a perfectly valid complaint simply may not exist, and a complainant therefore must rely on information and belief until it can take discovery. In such circumstances, a complainant should be allowed to rely on information and belief if it explains the reason for the complaint's lack of documentary support and describes its efforts to obtain that information. Accordingly, MCI recommended that complaints based on information and belief be disallowed only where a complainant had an opportunity to secure information from a defendant prior to filing its complaint but failed to do so. Where a complaint recites that a defendant withheld information in response to a complainant's pre-filing request, that recitation should be

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[13] US West at 2-6.

deemed sufficient to support an allegation based solely on information and belief.[14]

Numerous parties strongly oppose prohibiting complaints based on information and belief.[15] However, the most likely defendants -- i.e., the BOCs -- generally favor such a prohibition,[16] because it would effectively immunize them from many potential claims. NYNEX, however, offers a formulation similar to MCI's that would permit complaints based on information and belief. Like MCI, NYNEX recognizes that frequently, for reasons entirely outside of their own control, complainants may lack documentary support for entirely legitimate claims and should be allowed to seek relief in those circumstances.[17] Both the MCI and NYNEX proposals balance the due process and statutory rights of parties to bring complaints with the Commission's need to deter frivolous complaints.

MCI indicated that it did not oppose the Commission's proposals to require that parties identify individuals with

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[14] MCI at 12-13.

[15] See, e.g., ACTA at 4; American Public Communications Council at 3-5; CompTel at 6; GTE at 6-7; MFS at 6; Telecommunications Resellers Association (TRA) at 13.

[16] See, e.g., Ameritech at 2; AT&T at 5; BellSouth at 11-12; PacTel at 10; US West at 9-10.

[17] Under NYNEX's proposal, complaints could be based on information and belief provided the complainant does not have reasonable access to the information needed to support its complaint, the information is in the possession of the defendant and the complainant has tried unsuccessfully to obtain it, and the complainant presents circumstantial evidence indicating that its claim is true. NYNEX at 5-6.

relevant knowledge and provide copies or descriptions of relevant documents in their pleadings, but noted that those identifications are likely to be limited only to the documents upon which defendants intend to rely.[18] Other parties expressed similar concerns and argued that the Commission's proposals are too unwieldy, given the rapid pace at which complaint proceedings must be conducted. These parties contend that the identification requirement should be narrowed, if not dispensed with altogether.[19]

On the whole, although MCI does not believe that the proposal that all relevant documents be identified will be as effective as the Commission hopes in revealing all relevant evidence, it should provide at least a start in letting the other party know how to proceed with discovery. Without such a requirement, complainants would be denied essential information they need to exercise their discovery rights and prosecute their claims.

C. Motions

The Commission's proposals concerning motions were broadly supported by MCI and other parties. However, MCI suggested that the Commission modify its proposal to prohibit motions to amend complaints in most cases. As MCI observed, a complainant

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[18] MCI at 14-16.

[19] See, e.g., Bell Atlantic at 4-5; BellSouth at 13-14; NYNEX at 7-8; PacTel at 11-14; SWBT at 4-5.

frequently does not have access to all the information needed to assert a claim when it files its complaint because the defendant has withheld information, and therefore should not be precluded from subsequently amending its complaint when it learns new information. If a complainant is prohibited from amending its complaint where it learns of new facts or a new cause of action, monopoly carriers would be unfairly rewarded for withholding information about their violations of the Act.[20]

BellSouth, NYNEX, and PacTel favor prohibiting motions to amend complaints, but their views should be rejected.[21] The public interest favors giving complainants an opportunity to seek relief rather than in enabling defendants to avoid being held responsible for their actions. In any event, amendments to complaints should be infrequent: complainants have every incentive to make their pleadings as complete as possible at the outset, given the new tight statutory timetables for resolving complaints.

D. Discovery and Status Conferences

The parties overwhelmingly share MCI's opposition to the Commission's proposal to prohibit discovery as a matter of right and to permit discovery only at the discretion of the Staff. As MCI observed, discovery is essential to the protection of complainants' due process rights and to the development of a more

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[20] MCI at 22-23.

[21] Bell South at 19; NYNEX at 15; PacTel at 29-30.

complete record, which is in the Commission's decision-making interests. Discovery allows issues to be narrowed, gaps in the record to be filled, and provides the parties an opportunity to obtain essential information they could not otherwise obtain and to better understand the opposing party's views of the issues.[22]

Requiring parties to produce documents with complaints and answers would not be a substitute for discovery because, as MCI explained in its initial comments, parties typically do not have the essential documents and other information needed to fully present their positions at the initial pleading stage. Moreover, complainants cannot extract from defendants crucial documents or explanations for practices that they ultimately need in order to address the arguments raised by defendants without the benefit of discovery.

In its recent Non-Accounting Safeguards Order,[23] the Commission appeared to take the view that shifting the production burden to the defendant BOC in a complaint case alleging a violation of Section 271(d)(3), once the complainant establishes a prima facie case, would "ensur[e] that information relevant to the complainant's claim is disclosed early in the process, ...

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[22] MCI at 17-19.

[23] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-149, FCC 96-489 (rel. Dec. 24, 1996).

even in the potential absence of traditional discovery."[24] That conclusion, however, does not necessarily follow. Shifting the production burden simply requires the defendant to present evidence rebutting the complainant's case; it would not force the defendant to divulge evidence relevant to the case that might support complainant's case. Thus, the Commission's conclusion that shifting the production burden would preclude the need for discovery is incorrect.

It is crucial that this error in logic in the Non-Accounting Safeguards Order not be repeated in this proceeding. The Commission should recognize that all of the other informational requirements proposed in the Notice -- including attachment of documents on which a party relies and identification of all relevant documents and employees with relevant knowledge -- as well as the requirement that the production burden shift in a Section 271(d)(6) case, at best would provide a springboard for discovery, not a substitute.

Many parties, including some BOCs, broadly favored permitting self-executing discovery, although several recommended either reducing the number of interrogatories automatically permitted or allowing the Staff ultimately to control the number and scope allowed.[25] Very few parties suggested prohibiting

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[24] Id. at ¶ 350.

[25] ACTA at 6; AT&T at 15-16; Cincinnati at 11; GTE at 9-10 (limit interrogatories to 15); PacTel at 17-19; Sprint at 8-9; Teleport at 4 (limit interrogatories to 20); TRA at 16-17; USTA at 5 (limit interrogatories to 15); US West at 11.

automatic self-executing discovery.[26] Ameritech recommended that, in lieu of discovery, the Commission follow the pleading and document production requirements of Section 252(b) of the Act applicable to interconnection negotiations.[27] This approach essentially is the same as the Commission's proposal to require that parties attach documentary support to complaints and answers. However, as MCI explained, parties need additional information to prosecute and defend their positions, which can be obtained only through discovery.

NYNEX objected to automatic self-executing discovery, but recommended allowing parties to include up to 30 interrogatories with their complaints, answers, and replies, with the Staff determining at the initial status conference which ones to allow in light of the complaint and the evidence already presented.[28] That approach would give an unfair advantage to a defendant and should be rejected. It would allow a defendant to formulate interrogatories after seeing the complaint, but would require the complainant to propound interrogatories without even knowing the defendant's answer and its arguments, and without knowing what information it needs to elicit to address the defendant's arguments.

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[26] Ameritech at 2; BellSouth at 15-16; NYNEX at 9-10; SWBT at 6.

[27] Ameritech at 2-3.

[28] NYNEX at 9.

The Commission also should reject SWBT's suggestions to prohibit discovery as of right, to compel a complainant needing discovery to file its complaint in federal court, and to allow a defendant to remove any complaint to federal court. In SWBT's view, formal complaints before the Commission should be limited to matters where no discovery is necessary.[29] There is no statutory support for SWBT's position. The Communications Act expressly contemplates that a party may seek relief for violations of the Act before the Commission or in federal court, at its option. See 47 U.S.C. §§ 206-208. Discovery never has been, nor should be, the exclusive province of federal court actions involving claims for violations of the Communications Act. Indeed, federal courts often make primary jurisdiction referrals in Section 207 cases in order to secure the benefit of the Commission's expertise, particularly in more complex cases, where discovery is more likely. SWBT thus is proposing nothing more than an additional, superfluous step in cases that, in all likelihood, will end up before the Commission in any event.

Equally without merit is SWBT's suggestion that, in lieu of post-filing discovery, parties certify they engaged in pre-filing good faith discovery discussions and exchanges of information.[30] No such exchanges could replace discovery, however, because they would be voluntary. By contrast, a defendant can be compelled to answer interrogatories.

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[29] SWBT at 6-7.

[30] Id. at 6.

In sum, the arguments in favor of allowing self-executing discovery clearly outweigh those arguments opposed, for it is incontrovertible that complainants need discovery as a matter of simple due process to have a reasonable opportunity to prosecute their complaints. Furthermore, the Staff, at the initial status conference, can effectively control the discovery process to ensure that it is conducted efficiently and tailored to the needs of the particular case.

It would be useful if the Commission established a schedule for the filing of interrogatories, objections and answers thereto and the joint stipulation and for holding the initial status conference. The parties need an adequate amount of time after the defendant files its answer to formulate interrogatories, and they need an opportunity to present any objections to the other's interrogatories in advance of the status conference. The Commission therefore should be careful not to compress the dates for interrogatories, joint stipulation and the initial status conference unreasonably.

Consequently, MCI recommended in its comments that the initial status conference be held at least 20-30 days following service of the answer.[31] The upper end of that range is probably more realistic than a 20-day deadline would be, given everything that ought to be accomplished prior to the initial status

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[31] MCI at 20. NYNEX's proposal that the initial status conference should be held 10 days after the answer is filed would not allow enough time for interrogatories to be propounded and objections presented, and joint stipulation to be hammered out, in advance of the initial status conference. NYNEX at 9.

conference. Interrogatories should be served at least 10 days before the status conference, which would still leave an extremely tight schedule for objections to interrogatories and the joint stipulation. At the initial status conference, the Staff can resolve objections to interrogatories, and can set dates for the completion of discovery and the filing of briefs.

The parties agree that an order should be issued summarizing the Staff's oral rulings at the initial status conference, and most agree with the Commission's proposal to require that the parties submit a joint order.[32] Some commenters recommend, however, that the Staff issue that order.[33] As MCI observed, it would be preferable if the parties drafted that order because it would save the Staff time and would force the parties to cooperate, which might have certain benefits.[34]

E. Briefs

There is virtually unanimous agreement with MCI's view that briefs should be allowed even where no discovery is conducted.[35] Briefs permit parties to succinctly distill the factual information presented in complaints, answers and joint stipulations, and to address the legal arguments that the

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[32] See, e.g., ACTA at 7; AT&T at 20; Bell Atlantic at 6; SWBT at 8; TRA at 19.

[33] Cincinnati Bell at 13; NYNEX at 11.

[34] MCI at 20-21.

[35] See, e.g., ACTA at 9; AT&T at 18; CompTel at 11; MFS at 22; PacTel at 31-33; Sprint at 9; SWBT at 13; US West at 12.

Commission must confront. In short, briefs are important in all proceedings, irrespective of whether there is any discovery.

Only Bell Atlantic and NYNEX argue that briefs should not be routinely allowed in the absence of discovery and permitted only at the Staff's discretion.[36] As MCI explained, without briefs, the Commission would need proposed findings of fact and conclusions of law in complaints and answers, which would be pointless, since the complainant would not know the defendant's positions when drafting the complaint, and the parties would not have drafted their joint stipulation. The Commission therefore should permit briefs and allow the Staff to supervise the format, scheduling and scope of briefs.

Parties presented various briefing schedule suggestions,[37] but, as MCI observed, a uniform rule would be impractical, given the wide variety of complaint proceedings and the diverse factual and legal issues they present. Therefore, the preferable course would be to allow the Staff to establish a briefing schedule based on the demands and circumstances of the individual case.[38] However, the Commission should abandon its practice of requiring simultaneous initial and reply briefs -- which tends to lead to a disjointed discussion of the issues -- and instead adopt the federal court format of an initial plaintiff's brief, then a

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[36] Bell Atlantic at 4; NYNEX at 16-17.

[37] See AT&T at 17-19; CompTel at 11; MFS at 23.

[38] MCI at 25-26; US West at 12-14.

defendant's brief, followed by a plaintiff's reply brief.[39]

F. Damages

The parties generally agree that the Commission's bifurcation proposal is sensible and pragmatic. Some parties also support the Commission's proposal that complaints include detailed damages calculations.[40] As MCI explained, however, requiring a complainant to present at the outset a detailed calculation of damages would be unreasonable, since it would need discovery in order to obtain the information necessary for that calculation. Consequently, MCI recommended that complainants should instead provide a damages methodology, with a description of the information the complainant lacks, rather than a final damages figure.[41] After liability is determined and discovery is completed in the damages phase, the complainant could present the final calculation in its damages brief, and the defendant could present its views as to the appropriate award of damages in its brief. As MCI noted, the Commission traditionally has permitted a complainant to refine its damages calculations following the

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[39] MCI at 24-25.

[40] For example, BellSouth suggests that damages claims could be referred to mediation or a special master. Cincinnati Bell and NYNEX argue that complaints should precisely quantify damages, and SWBT similarly suggests that damages claims should be stated precisely and their determinations referred to an ALJ. See BellSouth at 18; Cincinnati Bell at 13-14; NYNEX at 13; SWBT at 10-12.

[41] MCI at 21-22. Accord AT&T at 10; CompTel at 9-10; TRA at 22-23.

filing of its complaint, and, often, following a finding of liability, as MCI recommends.

The intent of those parties insisting that damages claims be precisely specified in the complaint is clearly to undermine the ability of complainants to be recompensed for violations of the Act. No public interest would be served by compelling the complainant to calculate damages in its complaint precisely, particularly where the complainant places the defendant on notice as to the methodology it will employ in calculating damages and the defendant has a full opportunity in the proceeding to make its case regarding the amount of damages, if any, that should be awarded. Accordingly, the Commission should adopt MCI's recommendation.

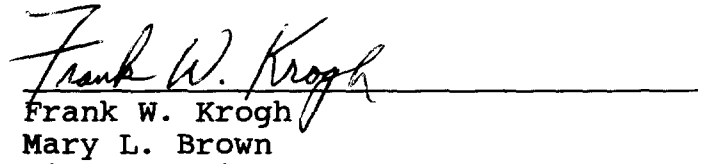
CONCLUSION

For the reasons stated in MCI's initial comments and in these reply comments, the Commission should adopt MCI's suggestions for revising its formal complaint rules to preserve

the due process rights of parties to obtain relief for violations of the Communications Act.

Respectfully submitted,

MCI TELECOMMUNICATIONS CORPORATION



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Dated: January 31, 1997

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I, Sylvia Chukwuocha, do hereby certify that the foregoing "REPLY COMMENTS" were served this 31st day of January, 1997, by hand delivery or first-class mail, postage prepaid, on the following parties listed below:

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